BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHESTER P. MORRIS Claimant	)	
VS.	)	
COUNTY OF GOVE Respondent	)	Docket No. 1,022,983
AND	)	
KS. WORKERS RISK COOPERATIVE Insurance Carrier	)	

ORDER

Respondent and its insurance carrier as well as the claimant requested review of the December 9, 2005 Award by Administrative Law Judge Bruce E. Moore. The Board heard oral argument on March 28, 2006.

APPEARANCES

Jeffrey E. King of Salina, Kansas, appeared for the claimant. Mickey W. Mosier of Salina, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found the claimant sustained a 6 percent functional impairment based upon Dr. Brown's rating. The ALJ denied claimant reimbursement for the cost of Dr. Brown's evaluation.

The respondent requests review of whether the claimant's accidental injury arose out of and in the course of employment. Respondent argues the going and coming rule applies in this case and therefore the claimant's accidental injury did not arise out of and

in the course of employment. Respondent further argues the claimant, a law enforcement officer, failed to abide by the speed limit and therefore should be limited to recovery under the Kansas Workers Compensation Act pursuant to K.S.A. 44-501(d)(1). If the claim is determined to be compensable, respondent argues the ALJ's Award should be affirmed.

Claimant requests review of the following: (1) nature and extent of disability; (2) whether claimant's accident arose out of and in the course of employment; and, (3) $400 payment of Dr. Brown's evaluation. Claimant argues he is entitled to a 10 percent whole body functional impairment based upon Dr. Brown's rating and the cost associated with the evaluation should be paid by respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award sets out findings of fact that are detailed, accurate and supported by the record. The Board adopts those findings of fact as its own to the extent that they are not inconsistent with the findings and conclusions expressed herein.

Briefly stated, claimant was injured in a single vehicle traffic accident while on his way home from his job as a Gove County sheriff's deputy. Initially, respondent argues the going and coming rule precludes an award of compensation in this case.

The "going and coming" rule contained in K.S.A. 2002 Supp. 44-508(f) provides in pertinent part:

> The words 'arising out of and in the course of employment' as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

K.S.A. 2002 Supp. 44-508(f) is a codification of the "going and coming" rule developed by courts in construing workers compensation acts. This is a legislative declaration that there is no causal relationship between an accidental injury and a worker's employment while the worker is on the way to assume the worker's duties or after leaving

those duties, which are not proximately caused by the employer's negligence.[1] In *Thompson*, the Court, while analyzing what risks were causally related to a worker's employment, wrote:

> The rationale for the "going and coming" rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.[2]

But K.S.A. 2002 Supp. 44-508(f) contains exceptions to the "going and coming" rule. First, the "going and coming" rule does not apply if the worker is injured on the employer's premises.[3] Another exception is when the worker is injured while using the only route available to or from work involving a special risk or hazard and the route is not used by the public, except dealing with the employer.[4]

The Kansas Appellate Courts have also provided exceptions to the "going and coming" rule, for example, a worker's injuries are compensable when the worker is injured while operating a motor vehicle on a public roadway and the operation of the vehicle is an integral part or is necessary to the employment.[5]

In this case it was claimant's uncontradicted testimony that he was "on duty" from the time he entered his patrol vehicle and notified dispatch that he is on-duty. And he continued on-duty until he parked his vehicle in his home driveway and notified dispatch to confirm he was off-duty. Although claimant was heading home when the accident occurred he had not left his employment because he had not reached home and notified dispatch that he was off-duty. Consequently, the "going and coming" rule is not applicable to the facts in this case. Moreover, it cannot be seriously argued that operation of a motor vehicle was not an integral part of claimant's employment. His trip to or from work could be interrupted by a call dispatching him to an incident.

Respondent next argues that because a highway patrol trooper concluded claimant was speeding when his accident occurred, compensation should be disallowed based upon K.S.A. 44-501(d)(1) as his speeding was analogous to a failure to use a safety device.

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[1] *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, 416 P.2d 754 (1966).

[2] *Thompson* v. *Law Office of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

[3] Id. at Syl. ¶ 1. Where the court held that the term "premises" is narrowly construed to be an area, controlled by the employer.

[4] *Chapman v. Beech Aircraft Corp.*, 258 Kan. 653, 907 P.2d 828 (1995).

[5] *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556 *rev. denied* 235 Kan. 1042 (1984).

K.S.A. 44-501(d)(1) provides:

> If the injury to the employee results from the employee's deliberate intention to cause such injury; or from the employee's willful failure to use a guard or protection against accident required pursuant to any statute and provided for the employee, or a reasonable and proper guard and protection voluntarily furnished the employee by the employer, any compensation in respect to that injury shall be disallowed.

The burden placed upon an employer by the Kansas Supreme Court with respect to this defense is substantial. As used in this context, the Kansas Supreme Court in *Bersch*[6] and the Court of Appeals in a much more recent decision in *Carter*[7] have defined "willful" to necessarily include:

> . . . the element of intractableness, the headstrong disposition to act by the rule of contradiction. . . . 'Governed by will without yielding to reason; obstinate; perverse; stubborn; as, a willful man or horse.' *Carter* at 85.

The mere voluntary and intentional omission of a worker to use a guard or protection is not necessarily to be regarded as willful.[8]

The claimant does not remember the speed he was traveling nor does he recall telling the highway patrol trooper who investigated the accident how fast he was traveling. But he admitted that he must have been going too fast for the conditions as evidenced by the fact he lost control of his vehicle.

Jason L. Draper, a Kansas Highway Patrol Trooper, investigated the accident and took a statement from claimant while he was being treated for his injuries. The trooper noted that the speed limit where the accident occurred was 55 miles an hour. When interviewed at the hospital claimant stated he was driving too fast going between 65 to 70 miles an hour. But the trooper agreed claimant was in quite a bit of pain when interviewed and the trooper further agreed he did not make an independent determination regarding the cause of the accident.

The ALJ concluded the evidence established claimant was speeding but nothing more because the fact claimant was speeding does not establish willful conduct. The Board agrees. Claimant's actions may well have been careless and negligent but the evidence does not rise to the level that his actions were intentional and deliberate. And

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[6] *Bersch v. Morris & Co.*, 106 Kan. 800, 189 Pac. 934 (1920).

[7] *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

[8] *Thorn v. Zinc, Co.*, 106 Kan. 73, 186 Pac. 972 (1920).

the majority of cases involving violation of traffic laws such as speeding have failed to find willful misconduct on the strength of the violation.[9]

Moreover, the claimant was injured while performing his work activities in a prohibited fashion by speeding. As such the accident is compensable. The ALJ noted the distinction in the following manner:

> While it is ironic that Claimant should benefit financially from engaging in conduct which violated the laws he was sworn to uphold, the workers compensation system is not premised upon fault. Injuries suffered while engaged in conduct performed in a prohibited fashion (e.g., driving too fast for conditions) nonetheless arise out of the employment relationship, while injuries suffered while engaged in prohibited conduct do not. Hoover v. Ehrsam, 218 Kan. 662, 544 P.2d 1366 (1976); *Terry Willingham v. Richard Haman*, Dkt. No. 1,006,099 (WCAB, 2003); and *Montgomery v. H & H Lawn Service*, Dkt. No. 268, 398 (WCAB, 2001).[10]

The Board affirms the ALJ's determination claimant suffered accidental injury arising out of and in the course of his employment.

The ALJ determined claimant suffered a 6 percent whole person functional impairment. The ALJ analyzed the medical evidence in the following fashion:

> The ratings of Drs. Smith and Brown are very similar as to Claimant's left upper extremity. Dr. Brown did see Claimant after his shoulder surgery, while Dr. Smith saw Claimant before that surgery. The Court believes that Dr. Brown had the better opportunity to assess Claimant's upper extremity impairment and adopts Dr. Brown's 5% impairment of function to the body as a whole for residuals of the left upper extremity injury. Claimant has sustained a 5% whole body functional impairment as a result of his left upper extremity injuries.
>
> The Court adopts Dr. Smith's rating of 1% to the body as a whole for Claimant's continued reliance upon Coumadin therapy. The *Guides* provide a range of 1% to 9% to the body as a whole for chronic Coumadin dependency. Dr. Smith noted that Claimant did not exhibit any of the factors that would justify anything more than the baseline rating, while Dr. Brown acknowledged that he did not even consider those factors. Claimant has sustained a 1% impairment of function to the body as a whole for his continued Coumadin use.[11]

The Board agrees and affirms.

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[9] *Larson's Workers' Compensation Law*, § 37.03.

[10] ALJ Award (Dec. 9, 2005) at 6.

[11] *Id.* at 6-7.

Finally, claimant argues Dr. Brown's evaluation cost should be paid by respondent. The claimant testified that he had a conversation with the insurance adjustor and was told that a second opinion regarding claimant's medical condition would be paid for by the insurance carrier. The claimant testified in pertinent part:

> Q. Sir, prior to coming in to see me, had you talked to the insurance adjustor about a second opinion from a physician regarding your medical condition?
>
> A. Yes, I'd talked to Marilyn Lernerd (sp) with IMA, I believe they're the administrator for the insurance for the county.
>
> . . .
>
> Q. What was involved in that conversation?
>
> A. Annette told me that they would pay for one other examination by a physician. Anything apart from that would be at my expense.
>
> Q. And at some point, because of some medical bills, you came and hired me?
>
> A. Correct.
>
> Q. And we had some discussions about finding another physician who obviously could be more liberal, but you wanted to get one that was agreeable to the insurance carrier?
>
> A. Correct.
>
> Q. And we did that with Dr. Brown and had an exam with Dr. Reiff Brown?
>
> A. That's correct.[12]

The claimant's attorney had conversations with respondent's counsel regarding the evaluation and it was agreed claimant could schedule the evaluation with either Dr. Brown or Dr. Mills.[13] The claimant has met his burden of proof to establish that respondent agreed to pay for Dr. Brown's evaluation. Consequently, the ALJ's Award is modified to reflect that respondent is liable for the cost of Dr. Brown's evaluation as an authorized medical expense.

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[12] R.H. Trans. at 16-17.

[13] *Id.*, Cl. Ex. 1.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Bruce E. Moore dated December 9, 2005, is modified to assess the cost of Dr. Brown's evaluation against respondent and is affirmed in all other respects.

IT IS SO ORDERED.

Dated this _____ day of April 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Jefffrey E. King, Attorney for Claimant
Mickey W. Mosier, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director